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ABSTRACT

Employment legislation in the United Kingdom from before 1970 to the 1990s has changed and with it collective bargaining in higher education. Industrial relations before 1970 were treated as a voluntary activity virtually unregulated by law. Then the Remuneration of Teachers Act 1965 set up the Burnham Committees, which until 1987 were the forum for salary negotiations and associated matters. In the 1960s and 1970s the normal pattern of collective bargaining was that unions made demands and management resisted, trying to minimize the concession they needed to make. The Donovan Commission and the resulting Donovan Report (1968) led to a great deal of legislation between 1970 and 1978 aimed at encouraging better regulated collective bargaining at workplace level. Legislation from 1979 onwards was aimed at regulating the power of the trade unions and bringing about a shift in the balance of power between unions and employers. As a consequence employers are now likelier to take a tough line in their handling of disputes and resulting defeat for the unions. Whatever policies higher education adopts for labor relations, college industrial relations should be a priority concern for managers and governors in the run-up to incorporation. Relevant Acts of Parliament are listed. (JB)

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Mendip Papers

The effects of employment legislation on collective bargaining

Bob Saunders

The Staff College

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From university, Bob went into industry as a sales office management trainee. He then spent five years in work study and O&M, culminating as head of work study in a factory producing photographic film. Bob then spent two years in personnel as group training manager before moving to training engineering employees which he spent 15 years doing. After this he moved to become firstly a deputy principal and then a principal lecturer in management. He joined The Staff College in 1988.

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Legal intervention before 1970

Industrial relations in the United Kingdom, unlike some other countries, were before 1970 treated as a voluntary activity virtually unregulated by law. Both employers and trade unions were committed to the principle of 'free collective bargaining' as a means of dealing with the relationship between them.

This is not to say that legislation was non-existent. The law did intervene in industrial relations from time to time, but usually in a limited way affecting specific sectors of industry.

In 1909, for instance, the trade boards, later renamed wages councils, were created to set minimum wages for industries where collective bargaining was not strong enough to protect wage levels. Again, in 1946 the Fair Wages Resolution laid down minimum terms and conditions of employment which had to be adopted by employers wishing to obtain government contracts. In the education sector, the **Remuneration of Teachers Act 1965** set up the Burnham Committees, which until 1987 were the fora for salary negotiations and associated matters, such as the grading of courses. More generally, legislation has at some periods made picketing a public order offence and at others a legitimate activity for employees in dispute with their employers.

The last 25 years

In 1965 the Donovan Commission was set up to review the activities of trade unions, employers and employers' associations. It was believed by the

government of the day that the declining competitiveness of British industry was as a result of the pattern of industrial relations then prevailing.

When the commission reported in 1968, it concluded that in most key industries national, centralised formal bargaining between employers and unions had little real impact. The setting of actual wage levels and working conditions depended far more on informal, often haphazard and disorganised plant bargaining in individual workplaces. This led to many disputes and often resulted in unfair and illogical pay structures. In the engineering industry, for instance, ridiculously low basic wages were negotiated nationally, and workers' actual earnings were controlled by the piecework bonus they earned.

The Donovan Commission suggested that what was needed was better organised plant bargaining; still voluntary, but supported by a framework of laws which protected individual rights and encouraged good industrial relations practices in the workplace.

The **Donovan Report** (1968) has led to a great deal of legislation, which can be seen to divide into two distinct periods. From 1970-1978 the sort of legislation foreshadowed by Donovan came on to the statute book, much of it aimed at encouraging better regulated collective bargaining at workplace level. It resulted in a noticeable improvement in procedures in organisations, without markedly reducing the incidence of disputes.

The period from 1979 onwards has been different. The legislation in this period has been aimed at regulating the power of the trade unions and bringing about a shift in the balance of power between unions and employers. In the 1960s and 1970s the normal pattern of collective bargaining was that unions made demands and management resisted, trying to minimise the concessions they needed to make. Now it is often managers who are initiating changes, with unions in the defensive role.

The remainder of this Mendip Paper reviews the legislation which has affected collective bargaining during the last 22 years. The Paper concentrates particularly on issues which may be important to the conduct of industrial relations in colleges. It is concerned with those enactments which specifically affect management/union relations, rather than provisions which affect the rights of individual employees. It also considers a number of 'hard line' strategies adopted by employers during trade disputes and suggests a more suitable approach for colleges in the 1990s.

Relevant legislation 1970-1978

During the period 1970-1978 were passed the following acts which were in different ways concerned with industrial relations:

- Equal Pay Act 1970;
- Industrial Relations Act 1971;
- Sex Discrimination Act 1975;
- Trade Union and Labour Relations Act 1974;
- Employment Protection Act 1975;
- Race Relations Act 1976; and
- Employment Protection (Consolidation) Act 1978.

Of these, the **Equal Pay Act 1970**, **Sex Discrimination Act 1975** and **Race Relations Act 1976** are primarily concerned with individual rights. They have affected local education authority (LEA) and college policies and practices and have sometimes been the subject matter of negotiation, but have had little effect on the process of negotiation itself.

Ted Heath's **Industrial Relations Act 1971** was speedily repealed by the subsequent Labour government and replaced by the **Trade Union and Labour Relations Act 1974**, but much of the industrial relations code of practice which it initiated remained in force until 1991. This included recommendations on the appointment, organisation and roles of shop stewards. In common with all such codes it was not legally binding, but could be quoted in tribunals and courts of law as evidence of good industrial relations practice.

The **Trade Union and Labour Relations Act 1974** defined 'independent trade unions' and arranged for them to be registered by the certification officer. It granted immunity from civil action for individuals or registered unions who encouraged people to break

their contracts of employment 'in contemplating or furtherance of a trade dispute'. This clarified the legal position of those taking individual action – something which had previously been by no means clear.

The **Employment Protection Act 1975** set up the Advisory, Conciliation and Arbitration Service (ACAS) charged with the general duty 'to promote the improvement of industrial relations'. Amongst its specific duties are the encouragement of the extension of collective bargaining, and working for the development – and where necessary, reform – of the machinery for collective bargaining between employers and unions. ACAS has no powers of enforcement but it has exerted a great deal of influence in its years of existence. It has become perhaps one of the most important innovations of this period in its effect on subsequent collective bargaining.

In its early days, there were complaints that ACAS was biased in favour of trade unions, particularly in the matter of disputes over union recognition. In the Grunwick dispute – which hit the national headlines because of the mass picketing it occasioned – the employers refused to co-operate with ACAS recommendations that they should recognise the union. In the event, ACAS proved powerless and this brought into question their credibility on this type of issue. Perhaps as a result of this, the **Employment Act 1980** abolished the union recognition procedure through ACAS.

Recent surveys, however, reveal that both employers and unions now see ACAS as impartial and effective. The service gives free advice on industrial relations and employment policy matters, and has been instrumental in encouraging employers to improve communications and adopt participative problem-solving approaches where these are appropriate. ACAS publishes useful advisory booklets and codes of practice, conducts research into industrial relation matters, and will conduct industrial relations audits in organisations on request.

Some of their most publicised activity is concerned with the settlement of trade disputes. On request from either of the parties to the dispute, or on their own initiative, they can offer the services of conciliation, mediation or, as a last resort, arbitration.

The process of *conciliation* involves both parties working with a neutral and independent conciliator. Here, it can sometimes be possible to say things to an independent person which would be impossible in open negotiation; and this can lead to progress being made over seemingly intractable problems.

Mediation involves ACAS in putting forward formal recommendations for the possible solution of a dispute. These recommendations can be accepted, rejected or discussed further by the parties, and can sometimes prove a means of shifting barriers to agreement.

Arbitration will only be arranged where all parties to the dispute agree in advance to accept the arbitrator's decision on an issue. The 'arbitrator' can be an individual or a small panel appointed by ACAS themselves or by the Central Arbitration Committee, an independent, permanent statutory body also set up by the **Employment Protection Act 1975**. Arbitration has to some extent fallen out of favour with employers because of its tendency to produce a compromise solution which may suit neither party; but it may sometimes be the only feasible way of reaching any sort of agreement.

The **Employment Protection Act 1975** also contained a provision about disclosure of information to trade unions. Employers are required to give unions the financial and other information they need for effective collective bargaining. Under Section 222 of the **Education Reform Act 1988**, governing bodies of colleges are made responsible for the disclosure of information. There is an ACAS code of practice **Disclosure of information to trade union for collective bargaining purposes** (1977) which gives advice in this area.

Many of these provisions were gathered together in the **Employment Protection (Consolidation) Act 1978** and that is where most of them now exist in statute. Other important matters in that Act include the right not to be penalised for trade union membership and the entitlement of officials of recognised independent trade unions to reasonable time off with pay, during working hours:

> to carry out those duties . . . . as such an official which are concerned with industrial relations between his employer and any associated employer, and their employees.

Trade union officials are also entitled to time off for relevant training.

A new Code of Practice (**Time off for trade union duties and activities** ACAS 1991) concerning time off for trade union duties and activities was produced by ACAS in 1991, to replace the original (1978) Code.

For teaching staff, 'time off' means more than just revising the timetable to make National Association of Teachers in Further and Higher Education (NATFHE) officials available for meetings and Trades Union Congress (TUC) courses; it implies a reduction in contact hours.

The case of Ratcliffe v Dorset County Council (1978) related to time off for public duties, but it established a principle which almost certainly applies to time off for union duties and training also. The college reorganised the timetable to free Mr Ratcliffe during the afternoons to enable him to attend local council meetings, but expected him to attend college for 30 hours a week to complete his full duties. The tribunal said that 'making his timetable flexible' was not enough: 'swapping time around is not giving time off'. The law requires real, not token concessions.

If one looks back over the legislation passed between 1970 and 1978, it can be seen that it reflects a clear intention to improve local collective bargaining both by providing encouragement and support through ACAS and by giving protection, time and information to trade unionists. The legislation since that time has been very different.

Employment legislation 1979-1992

Since 1979 successive Conservative governments have gradually weakened the powers of trade unions and reduced their freedom of action in the conduct of industrial relations.

This process has been achieved by instalments. Each enactment has moved the balance of power a little further towards the employer, with cumulative effect. The acts concerned have been:

- Employment Act 1980;
- Employment Act 1982;
- Trade Union Act 1984;
- Wages Act 1986;
- Employment Act 1988;
- Employment Act 1989; and
- Employment Act 1990.

The legislation of this period, coupled with a number of important legal precedents established in the courts, has had a significant effect on the conduct of industrial relations in the last few years.

The pressure on employers to pay reasonable minimum wages has been reduced by the rescindment of the Fair Wages Resolution in December 1982. In addition, the **Wages Act 1986** abolished some wages councils and reduced the powers of those which remained. The Government's argument was that unemployment would reduce if minimum wage requirements were eased for employers.

In 1991 the Code of Practice on Industrial Relations (Department of Employment, 1972), with its strong advice on the need for communication and consultation between management and unions, was withdrawn.

The unions' freedom to undertake industrial action, which had been clarified by the **Trade Union and Labour Relations Act 1974**, has now been considerably curtailed. Union immunity to civil court action still exists, but only if complex procedures are followed before industrial action is called, and on a limited range of disputes.

Since 1982, unions and their officials are liable for damages if unlawful industrial action is organised.

If industrial action is to be lawful, it must first of all be a genuine trade dispute, as defined in the **Trade Union and Labour Relations Act 1974**. Since the **Trade Union Act 1984**, it must be preceded by a properly conducted ballot of all those, but only those, who will be likely to take industrial action. If one person who did not have the chance to vote is later induced to take action, this can invalidate the whole ballot and make the action unlawful.

Any action undertaken must be called after the ballot results are known but within four weeks, otherwise a new ballot becomes necessary (**Employment Act 1990**). The only exception is where a court agrees to extend the period because a

subsequently lapsed court order prevented action during the four week period.

The ballot paper must include the statement 'if you take part in a strike or other industrial action, you may be in breach of your contract of employment'. It must ask either or both of two questions with 'yes' or 'no' answers, asking if the member is:

(a) prepared to strike;

(b) prepared to take action short of a strike.

A separate majority of those voting is needed for each question before the action it suggests can be lawfully undertaken. There are more detailed rules about how the ballots are to be conducted, a mistake on any one of which could invalidate the proceedings. The Code of Practice **Trade union ballots on industrial action – 1st revision** (Department of Employment, 1991) gives guidance on this complex series of requirements.

Since the **Employment Act 1988**, union members can no longer be disciplined by their union for disobeying a call to industrial action, even if the majority of the membership supported it in a proper ballot.

As a result of the **Employment Act 1990**, a union has no immunity from civil action if it organises secondary industrial action directed against an employer not party to the dispute which causes the breach, or interference with the performance of a contract of employment.

This can have consequences for further education as a result of the **Education (modification of enactments relating to employment) order 1989**. Governing bodies of colleges are accountable at law as if they are employers for certain aspects of employment legislation, notably unfair dismissals and discrimination, but also for handling trade disputes on matters which are within their remit when exercising their staffing powers. Disputes on matters where the LEA is accountable are, however, disputes with the LEA.

If a dispute is with the LEA, it will be possible for union members in one college, after the necessary ballot, to take action in sympathy with colleagues in another. If, however, the dispute is with a governing body, sympathy action in another college will be unlawful secondary action, leaving the union vulnerable to an injunction or a claim for damages. Individuals, as well as the union itself, can be sued for damages by their governing body if industrial action is unlawful and a loss has been suffered by the college as a result of it. Of course, when colleges become corporate bodies, all disputes will be with the governors.

Employers' 'hard line' strategies

One of the effects of the legislation of the last 12 years is the change it seems to have brought about in the attitudes of employers and union leaders.

Employers are now far likelier to take a tough line in their handling of disputes, and in many cases this has resulted in defeat for the unions. This trend has been assisted, of course, by a high rate of unemployment and a corresponding decline in trade union membership and support.

Publicity has been given to a number of disputes in which injunctions, damage claims and even sequestration of union assets have played a part. Other employers have shown their muscle by dismissing strikers or stopping their pay.

If an employee refuses to obey a legitimate instruction it could be a disciplinary matter, or it could be industrial action by the employee. It is important to know which, because the consequences of dismissal for those two reasons are quite different. Dismissals for indiscipline could result in the employee taking an unfair dismissal claim to an industrial tribunal. If you dismiss someone taking industrial action, different rules apply.

Dismissal of people engaged in official industrial action, which includes strikes or any other action which breaches the employment contract, is only unfair if:

(a) one or more employees engaged in the action have **not** been dismissed

OR

(b) someone (but not everyone) has been reinstated within three months of their date of dismissal.

In other words, it can only be unfair if all the employees involved have not been treated equally.

The justification given for sacking official strikers is that it puts pressure on them to reach a settlement. It may, however, have the opposite effect of hardening attitudes and is not a course that should be adopted without careful thought as to the possible consequences. There are also practical difficulties, caused by the fact that every striker, without exception, must be sacked, but no one who is not striking. People who are away ill when the strike starts, or who refuse or are unable to cross picket lines, present particular problems in this regard.

In the **Employment Act 1982** unions are made responsible for industrial action initiated by local officials or shop stewards. If, however, the industrial action has been repudiated by the trade union it becomes unofficial. This protects the union itself from civil actions for damages or sequestration of assets, but means – since the 1990 Act – that the strikers themselves may be selectively dismissed and will have no right to complain of unfair dismissal.

Another action which has become popular with employers is to stop the pay of people taking industrial action. There is no problem in stopping the pay of strikers; if the worker breaks the contract of employment by not working, there is no obligation on the employer to fulfil the other side of the contract by continuing to pay salaries. Indeed, most local authorities have a policy of deducting pay from college staff for days on strike.

If, in undertaking industrial action short of a strike, an employee does a part, but not all of the job, then the employer has two choices of action in stopping pay. The employee can be given notice that the employer intends to pay no remuneration while the contract is not being properly fulfilled. Alternatively, after a similar declaration of intent, the employer can pay a proportion of salary equivalent to the proportion of the work being undertaken. If, however, partial performance of the job is tolerated and not regarded as a breach of the contract, then full remuneration must be paid.

The next 10 years

The use of court action against trade unions, and the trend towards retaliation against those taking industrial action by dismissing them or stopping pay, both illustrate a much tougher approach to the conduct of industrial relations than was seen between the second world war and the early 1980s.

There was a period when some unscrupulous unions found they could progress their claims most rapidly by using a pre-emptive strike as a precursor to talks. The pendulum has now swung the other way, and some employers have recently used coercion rather than negotiation as the quickest way of bringing about change in their organisations.

Both sides in industrial relations will do well to remember that pendulums invariably reverse direction sooner or later, and the further they are pushed in one direction the further they fly back the other way.

Power in industrial relations is a tenuous matter. Factors such as a change of government, the increasing influence of European directives and the severe shortage of professional and technical staff, which is forecast as a result of demographic trends, all mean that during the 1990s we could see a resurgence of union influence and much more vulnerable employers.

The best recipe for sound industrial relations is, as it always has been, fairness, reasonableness and mutual respect. There should be adequate communication and a willingness to co-operate and negotiate, coupled with firmness in the face of unreasonable demands by the other side. If the right relationships can be developed between governing bodies, management and unions, there should be little need for recourse to the more punitive aspects of law.

On the other hand, some of the law's more constructive provisions may help these right relationships to develop. Governing bodies may, for instance, find it useful to employ some of the services of ACAS – not only in times of dispute, but in order to help them develop the sort of industrial relations policies and procedures which are needed for a healthy industrial relations climate in the years to come.

However these policies are developed, one thing is certain; college industrial relations should be a priority concern for managers and governors in the run-up to incorporation.

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